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The Cantamar LLC v. Carlton J. Champagne; Lon E. Williams; and Data Systems International, Inc. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE CANTAMAR LLC, Plaintiff and Appellee, vs. CARLTON J. CHAMPAGNE; LON E. WILLIAMS; and DATA SYSTEMS INTERNATIONAL, INC., Defendants and Appellants.	BRIEF OF APPELLANTS Appellate Case No.20050778CA Trial Court Case No. 030600077 Appeal

The Court and Judge below: Second Judicial District Court, Davis County, Layton Department, State of Utah, Judge Darwin C. Hansen.

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LIST OF PARTIES

The names of all parties to the proceedings before the district court below are contained in the caption.

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STATEMENT OF JURISDICTION

The jurisdiction of the Court of Appeals is based on the provisions of U.C.A., §78-2a-3(2)(j).

STATEMENT OF ISSUES

1. Did the court below err in refusing to admit parol evidence regarding the purpose and terms of the Note, the circumstances surrounding it, and the course of dealing of the parties? (Preserved below, R. 103-114).

Standard of appellate review: The determination of whether to allow parol evidence is a question of law, *Spears v. Warr,* 44 P.3d 742, 750 (Utah 2002), which will be reviewed for correctness, without deference to the trial court's conclusion. *Birch v. Fire Insurance Exchange,* 122 P.3d 696, 698 (Utah App. 2005).

2. Did the court below err in concluding that even though it was Cantamar's agent who failed to fulfill the condition precedent, Cantamar was nevertheless entitled to disregard the condition and enforce the full amount of the Note against Defendants? (Preserved below at R. 111-112)

Standard of appellate review: The effect of the failure of the condition precedent is a question of law, *Harper v. Great Salt Lake Council, Inc.*, 976 P.2d 1213, 1217 (Utah 1999), which will be reviewed for correctness. *Birch, supra.*

3. Did the court below err in concluding that the Note is an integrated agreement as a matter of law, despite the fact that it was only one of at least 8 writings? (Preserved below at R. 103-110)

Standard of Review: The determination as to whether or not a writing is integrated is a question of fact, not law. *Bullfrog Marina, Inc. v. Lentz,* 501 P.2d 266, 270 (Utah 1972). The court's conclusion that there were no genuine issues of material fact should be reviewed for correctness as set forth in issue no. 9 below.

4. Did the court below err in concluding that the Note is unambiguous as a matter of law? (Preserved below at R. 109-110).

Standard of review: Whether ambiguity exists in a contract is a question of law, *WebBank v. American General Annuity Service Corp.*, 54 P.3d 1139, 1145 (Utah 2002), which will be reviewed for correctness. *Birch, supra.*

5. Did the court below err in granting summary

judgment despite factual allegations of fraud in the inducement of the Note? (Preserved below at R.113-114)

Standard of review: Issues relating to fraud are issues of fact. *Berkeley Bank for Cooperatives v. Meibos*, 607 P.2d 798, 801 (Utah 1980). The court's conclusion that there were no genuine issues of material fact should be reviewed for correctness as set forth in issue no. 9 below.

6. Did the court below err in concluding as a matter of law that default and compounded interest charges averaging about 35% per annum were not an unenforceable penalty, but rather represented a reasonable estimation of actual damages? (Preserved below at R.115-118)

Standard of review: Whether contract charges are reasonable estimations of actual damages is a question of fact. *Woodhaven Apartments v. Washington*, 942 P.2d 918, 921-922 (Utah 1997). The court's conclusion that there were no genuine issues of material fact should be reviewed for correctness as set forth in issue no. 9 below.

7. Did the court below err in concluding as a matter of law that the Note should not be reformed? (Preserved

below at R. 267-270)

Standard of review: Whether a contract should be reformed presents issues of fact. *Katzenberger v. State,* 735 P.2d 405, 408 (Utah App. 1987). The court's conclusion that there were no genuine issues of material fact should be reviewed for correctness as set forth in issue no. 9 below.

8. Did the court below err in awarding attorney's fees and costs to Cantamar for enforcing the Note, despite the fact that Cantamar is in violation of an oral agreement not to enforce the Note? (Preserved below at R. 270-272)

Standard of appellate review: Whether or not to grant attorney's fees under a contract is a question of law, *Mi Vida Enterprises v. Steen-Adams,* 122 P.3d 144, 147 (Utah App. 2005), which will be reviewed for correctness. *Birch, supra.*

9. Did the court below err in concluding that there were no genuine issues of material fact and that summary judgment was appropriate as a matter of law? (Preserved below at R. 60-67; 103-114).

Standard of appellate review: On review of summary judgment, the appellate court reviews the trial court's determinations of no genuine issue of material fact for correctness, without granting any deference. *Woodbury Amsource, Inc. v. Salt Lake County,* 73 P.3d 362, 364 (Utah 2003). In doing so, the appellate court employs the same standard as the trial court; that is, it views facts and inferences in the light most favorable to the party opposing summary judgment. *Durham v. Margetts,* 571 P.2d 1332, 1334 (Utah 1977); *English v. Kienke,* 774 P.2d 1154, 1156 (Utah App. 1989). If the appellate court's review indicates that a genuine issue of material fact exists, summary judgment will be overturned and the case remanded for further proceedings. *English, supra,* 774 P.2d at 1156. If not, the appellate court will review the trial court's conclusions of law for correctness. *Id.*

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of the appeal or of central importance to the appeal.

STATEMENT OF THE CASE

This is a breach of contract case. The complaint was filed by Plaintiff, The Cantamar, LLC ("Cantamar") against the Defendants, Data Systems International, Inc., Carlton J. Champagne, and Lon E. Williams (hereinafter collectively "DSI") on or about January 9, 2003. A summary judgment motion was filed by Cantamar on or about June 16, 2003. That motion was denied, without prejudice, on May 6, 2004. Following additional discovery, a renewed motion for summary judgment was filed by Cantamar on or about May 3, 2005. The renewed motion was granted at a hearing held on July 7, 2005, and summary judgment entered on September 6, 2005. Notice of Appeal was filed on September 7, 2005. Defendant Lon E. Williams filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code on October 14, 2005, commencing Bankruptcy No. 05-39013 in the United States Bankruptcy Court, District of Utah.

Following is a statement of facts relevant to the appeal:

1. In the spring of 2000, Carl Champagne, the president of DSI, was introduced to a loan and investment

broker named Troy Thuett. (Affidavit of Carl Champagne ("Champagne Aff."), ¶¶1, 5; R. 61).

2. Thuett assured DSI that he could obtain a $15,000,000 investment for DSI (the "Investment"). (*Id.*, ¶6; R. 61).

3. Starting in 2000, Thuett began lending money to DSI. In making the loans, Thuett represented three different entities: Covenant Funding Group, Commercial Lending Group, Inc., and Cantamar. (*Id.*, ¶10; R. 61-62).

4. The first loan was made in the summer of 2000, in the amount of $10,000, to pay a broker fee. There was a written promissory note for $10,000, but DSI has not been able to locate a copy of that note. Prior to borrowing this money, DSI expressly agreed with Mr. Thuett that repayment would only be made from proceeds of an Investment obtained by him. (*Id.*, ¶11; R. 62).

5. When the Investment did not occur by the spring of 2001, a second loan was made. It was a line of credit in the amount of $220,000. The prior $10,000 loan was rolled into the line of credit, and cash advances were made in March 2001, in the amounts of $44,700 and $66,850. These

cash advances were used for operations, loan broker fees, and interest payments on the loans. (*Id.*, ¶12; R. 62).

6. The interest rate stated in the $220,000 note was 72%. (R. 70).

7. Although evidenced by a promissory note, the line of credit for $220,000 was not intended to represent an obligation in the amount of $220,000. Rather, it expressed a willingness to lend DSI up to that amount. As with the other loans, it was subject to the verbal agreement that no repayment would be due unless and until an Investment were obtained by Thuett. (*Id.*, ¶13; R. 62).

8. During the summer of 2001, Thuett was working on obtaining a $1,500,000 Letter of Credit for DSI to facilitate obtaining the Investment. The parties agreed that upon obtaining the Letter of Credit, Thuett would be paid $175,000, and would be given 200,000 option shares in DSI. The parties executed an Agent Agreement and Contract at this time, reflecting their relationship and the goal of obtaining the Letter of Credit and the Investment. (*Id.*, ¶14; R. 63).

9. DSI signed a promissory note reflecting the

potential obligation to pay a fee of $175,000. The note was conditioned on Thuett obtaining the Letter of Credit. The verbal agreement of the parties was that the note would only be enforceable if and when a $1,500,000 Letter of Credit was issued. The Letter of Credit was never obtained. No claim has been made that the amount shown on the $175,000 note is an obligation of DSI, and no effort to enforce that note has been made. (*Id.*, ¶15; R. 63).

10. The interest rate stated in the $175,000 note was 35%. (R. 76).

11. During the summer of 2001, Thuett made two additional cash advances to DSI: an advance of $70,000 on June 1, 2001, and an advance of $40,896.00 on July 31, 2001. To memorialize these advances, another promissory note was created, in the amount of $115,000.00. The money from these two advances was used to make interest payments on the loans, for broker fees and for DSI's operations. (*Id.*, ¶16; R. 63).

12. The interest rate stated in the $115,000 note was 60% until due, and 120% thereafter. (R. 80).

13. The next loan occurred in the fall of 2001, when

Thuett lent DSI $15,000 to make interest payments on the prior loans. (*Id.*, ¶17; R. 64).

14. The interest rate stated in the $15,000 note was 60% until due, and 120% thereafter. (R. 84).

15. In January, 2002, another loan to pay interest on prior loans was made, also in the amount of $15,000. (*Id.*, ¶18; R. 64).

16. The interest rate stated in the second $15,000 note was no interest until due, and 30% thereafter. (R. 88).

17. The last loan was made in January, 2002, in the amount of $269,285.07. A promissory note (the "Note") for this loan was signed. (A copy of the Note is included in the Addendum). Along with the Note, DSI gave Mr. Thuett an option to buy stock in DSI. (*Id.*, ¶19; R. 92-96).

18. The interest rate stated in the Note was 8% until due, and 30% thereafter. (R. 92).

19. The Note did not include any cash advances to DSI. It was nothing more than a consolidation of all prior loans. Mr. Thuett prepared a ledger showing how he arrived at the principal balance for the Note. The ledger appears to accurately reflect loans and interest payments. (*Id.*, ¶20;

R. 98-99).

20. From 2000 to 2002, Thuett and the representatives of DSI often discussed DSI's financial situation and the need for the Investment. Mr. Thuett would question DSI's representatives about DSI's money needs and then offer to make loans to DSI. He offered the loans to DSI in order to make the interest payments on prior loans and because he kept assuring DSI that the Investment was imminent. (*Id.*, ¶¶22 and 23; R. 65).

21. Each time a loan was made, DSI's representatives stressed to Mr. Thuett, and he agreed, that DSI would not be able to re-pay the loan until the Investment was made to DSI. That understanding was a critical component of each of the loans, since DSI knew and Mr. Thuett knew that DSI did not have any other source for re-paying the loans. (*Id.*, ¶24; R. 65).

22. With regard to the interest rates stated in the notes, DSI agreed to pay those rates only on condition that an Investment were to be obtained from which the interest could be paid. (Deposition of Carl Champagne, July 13, 2004, at 53; R. 218).

23. DSI would not have accepted any of the loans, or signed any of the promissory notes, without two explicit assurances from Mr. Thuett in connection with each loan: first, that the loan could not and would not be repaid until the Investment was made; and second, that an Investment was imminent. (Champagne Aff., ¶25; R. 65).

24. On January 11, 2002, DSI's representatives met with Mr. Thuett in his office. Those present at the meeting were Carl Champagne, Lon Williams and Brian Bingel of DSI, and Mr. Thuett. He prepared the Note while they were there. They received no legal or financial advice regarding the Note. During the meeting, DSI's representatives specifically agreed with Mr. Thuett that the Note would not be repaid, except from the proceeds of an Investment that Mr. Thuett would obtain for DSI. He again assured DSI that the Investment was imminent. (*Id.*, ¶26; R. 66).

25. There was no discussion or agreement, either during the meeting on January 11, 2002, or at any other time, to the effect that the Note was intended as a final or complete expression of DSI's agreements with Mr. Thuett and his companies. To the contrary, it was understood by all

present at the meeting that the business affairs of DSI and Thuett and his companies were incomplete, and that future work, performance and agreements would be required on both sides before completion of the business relationship. Specifically, all agreed and understood that only the successful closing of an Investment would allow the parties to complete the deal. (*Id.*, ¶28; R. 66).

26. The gist of DSI's ongoing agreement with Mr. Thuett was as follows: if DSI would allow Thuett and his companies to continue acting as DSI's broker, Thuett would find an Investment for DSI, and in the meantime would advance money to keep DSI viable; DSI would only re-pay the advances (and the broker fee) from an Investment obtained for DSI by Thuett. (*Id.*, ¶29; R. 67).

SUMMARY OF ARGUMENTS

The court below excluded parol evidence of an oral agreement conditioning repayment of the Note on obtaining an Investment. The exclusion of evidence was erroneous. The parol evidence rule only applies to integrated agreements and the Note is not an integrated agreement. The parol evidence rule only applies to unambiguous agreements and the

Note is ambiguous. The parol evidence rule does not bar evidence of fraud, mistake or condition precedent. Even if the evidence was properly excluded, which it was not, there are genuine issues of material fact relating to whether the interest charged in the Note is an unenforceable penalty. Finally, Cantamar is not entitled to attorney's fees because Cantamar itself is in breach of the oral agreement to obtain an Investment prior to enforcing the Note. For all the foregoing reasons, summary judgment should be reversed and the case remanded for trial.

ARGUMENT

I.

IT WAS ERROR FOR THE COURT BELOW TO CONCLUDE AS A MATTER OF LAW THAT THE NOTE WAS AN INTEGRATED CONTRACT

The court below concluded as a matter of law that the Note was an integrated agreement. (*See* Findings of Fact and Conclusions of Law and Order Granting Plaintiff's Renewed Motion for Summary Judgment (hereinafter the "Findings and Conclusions"), at 5, ¶5; R. 465-470; a copy of the Findings and Conclusions is included in the Addendum). This was error. The determination as to whether or not a writing is

integrated is a question of fact, not law. ***Bullfrog Marina, Inc. v. Lentz,*** **501 P.2d 266, 270 (Utah 1972);** ***accord, Novell, Inc. v. The Canopy Group, Inc.,*** **92 P.3d 768, 772 (Utah App. 2004).**

The fact question to be answered is "whether the parties did <u>in fact</u> adopt a particular writing or writings as the <u>final and complete</u> expression of their bargain." ***Bullfrog Marina, supra,*** **501 P.2d at 270 (emphasis added).**

To protect the integrity of written agreements, there is a rebuttable presumption that a writing which on its face appears integrated is, in fact, integrated. ***Union Bank v. Swenson,*** **707 P.2d 663, 665 (Utah 1985).**

In its Findings and Conclusions, the court below identified those aspects of the Note tending to show that, on its face, it appears to be an integrated agreement. (Findings and Conclusions, at 5, ¶4). Other aspects of the Note, ignored by the court below, are inconsistent with integration: for example, there is no integration clause in the Note. There is no mutual release. There is no statement indicating disposition of all claims.

The court below disregarded those aspects of the Note

inconsistent with integration, and found integration as a matter of law. *Id.* In doing so, the court also disregarded the principle that any presumption of integration arising from the face of the Note is rebuttable. *Union Bank, supra.*

On appeal from summary judgment, a rebuttable presumption is overcome if the court concludes, after viewing the evidence in the light most favorable to the party opposing summary judgment, that there is a genuine issue of material fact. *Genzmer v. Public Health Trust of Miami-Dade County,* 219 F.Supp.2d 1275, 1279-1280 (S.D. Fla. 2002); *Cansler v. Mills,* 765 N.E.2d 698, 705-707 (Ind. App. 2002). Stated differently, summary judgment in favor of a rebuttable presumption should be reversed if sufficient evidence has been submitted so that a reasonable trier of fact could find against the presumption. *Singh v. Blue Cross/Blue Shield of Massachusetts, Inc.,* 308 F.3d 25, 32 (1st Cir. 2002).

Although there are no Utah cases on the question of the sufficiency of evidence needed to overcome a rebuttable presumption on summary judgment, there is Utah law consistent with the standard set forth above. Describing

the legal effect of a rebuttable presumption in an employment case, the Utah Supreme Court said:

> **To rebut is to overcome, to contradict, to persuade or convince to the contrary. ... Since the employer must produce sufficient evidence to overcome the presumption of negligence, <u>of course the jury must weigh the evidence in the light and against the force of the presumption, to determine whether it has been outweighed or overcome</u>.**

Buhler v. Maddison, **176 P.2d 118, 124 (Utah 1947).**

In the present case, there was ample evidence to rebut, for purposes of summary judgment, any presumption of integration adhering to the Note. (*See, generally,* Statement of the Case, *supra,* ¶¶1 through 26). The Note was only one of seven notes. (*See* Champagne Aff., Exhibits A, C, D, E, F and G, R. 69-94). At the time each of the seven notes was signed, the parties agreed that no repayment would be made unless and until an Investment were first obtained. (R. 65) This agreement was a critical part of the ongoing business relationship between Thuett and his companies and DSI, because all were aware that without an Investment there would be no way to repay the loans. (R. 65) Without the agreement conditioning repayment, DSI would not have accepted the loans or signed the notes. (R. 65).

In addition to the notes, the parties entered into a written Agent Agreement and Contract. This agreement expressed in writing the ongoing condition precedent:

> CLG has loaned DSI other bridge funds for operating capital and interim capital needs. It is the intent of DSI to pay all loans and interest in full <u>upon the funding of the WAFI loan.</u>

Agent Agreement and Contract, attached to Champagne Aff. as Exhibit B, R. 74 (emphasis added).

The last promissory note in the series was the Note. (R. 64). The Note did not include any actual money or new value. (R. 64). It was simply a rollover of the prior notes. (R. 64) The same agreement was made when the Note was issued as had been made in connection with all the prior notes: there would be no repayment unless and until an Investment were to be obtained. (R. 66).

At the time the Note was signed, it was understood by the parties to it that their business affairs were incomplete, that substantial future work and further agreements would be necessary, and that only the successful closing of an Investment would allow the parties to complete their deal. (R. 66).

The foregoing evidence is sufficient to rebut the presumption of integration because it raises a genuine issue of fact as to whether the Note expressed the complete agreement of the parties, or only a part of it. Where parol evidence shows that the writing in question expresses only part of the agreement, courts refuse to find integration. *Bullfrog Marina, supra,* 501 P.2d at 271-272; *accord, Magelsen v. Farnworth,* 2005 WL 914186 (Utah App. 2005) ("the written contract [is] one piece of the parties' <u>ongoing and evolving agreement</u> rather than ... the 'final and complete' expression of their intent") (emphasis added) (a copy of the *Magelsen* case is included in the Addendum).

Cases finding integration tend to follow a fact pattern different from that in the present case. For example, in *Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist,* 773 P.2d 1382 (Utah 1989), the progression of events followed a pattern leading to an integrated agreement: a course of business dealings, followed by disputes, followed by negotiations, followed by a comprehensive settlement agreement. 773 P.2d at 1383-1384. As the Utah Supreme Court observed:

> The settlement agreement of January 24, 1983, <u>deals in a comprehensive fashion with the</u>

> relationship ... This indicates that the parties' whole agreement is contained in the document.

Id. at 1385 (emphasis added); *accord, Terry's Sales, Inc. v. Vander Veur,* 618 P.2d 29, 32 (Utah 1980)

A similar fact pattern-dispute, negotiation, then settlement--appears in *Novell, Inc. v. The Canopy Group,* 92 P.3d 768 (Utah App. 2004). In *Novell,* the parties negotiated in detail regarding the amount and method for calculating royalties. *Id.* at 770. Following those negotiations, the parties entered into a written agreement that spelled out their agreement on that precise point. *Id.* For that reason, that subject was closed to parol evidence:

> Canopy's evidence clearly shows the parties participated in prolonged negotiations to settle their disagreements regarding the deductions and Novell's overall percentage. ... [R]egardless of whether the parties may have had preliminary agreements about a given subject during the course of negotiations, we will assume that a writing dealing with the *same subject* was intended by the parties to supercede any prior or contemporaneous agreements. [cites omitted]

Novell, supra, 92 P.3d at 772 (underlined emphasis added; italicized emphasis in the original).

It makes sense to bar parol evidence where extensive negotiations over a defined subject matter produce specific agreement on that point. Allowing parol evidence of claimed inconsistent oral agreements in such a setting would undermine the parties' efforts and cheapen the value of written agreements. The *Novell* case provides a striking example of this concern:

> There is no dispute that earlier drafts of the License Agreement included a deduction for litigation expenses in the definition of the term "Royalty Base". There is also no dispute that at the six-hour "marathon" closing, after several drafts of the agreement were proposed and discarded, the litigation expense deduction was removed.

Novell, supra, 94 P.3d at 774 (emphasis added)

In other words, the "oral agreement" Canopy was arguing for in litigation had been proposed by Canopy (perhaps more than once) in its extensive negotiations with Novell, but had never been accepted by Novell; and at the final negotiating session was dropped by Canopy. It would be wrong to allow Canopy to impose in litigation a contract term that Novell had never agreed to in negotiations.

In contrast, cases refusing to find integration feature a fact pattern inconsistent with the notion of a complete and final agreement. These cases tend to reflect more elastic business relationships, ongoing or evolving deals, or multiple written agreements, each covering only a part of the whole. *See, e.g., Bullfrog Marina, supra; Magelsen v. Farnworth, supra; and Spears v. Warr,* 44 P.3d 742, 746-747 (Utah 2002).

The fact pattern in the present case fits with those cases refusing to find integration. The business relationships were ongoing and evolving. The loans to DSI were only a part of the business relationship. The Note was only one of 8 written agreements, each covering only a part of the deal. The language of the Note is limited rather than comprehensive. The Note was not the product of careful negotiation, but instead was a form agreement generated by Mr. Thuett while DSI's representatives sat in his office. (R. 66) The agreement that payment was to be made only if and when an investment occurred was not just a proposal or a negotiating point but instead was agreed on by both parties as a necessary element of the ongoing business relationship. (R. 65-67).

In these circumstances, summary judgment was erroneous because it focused solely on the Note, disregarded everything else, and imposed an agreement not contemplated by the parties and unfair to DSI.

II.

GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT ON THE ISSUE OF AMBIGUITY

The court below concluded that the Note was unambiguous. (Findings and Conclusions, at 4, ¶3). Based on that conclusion, and its finding that the Note was integrated, the court below refused to consider DSI's parol evidence and granted summary judgment. *Id.*, at 6.

Whether ambiguity exists in a contract is a question of law. *WebBank v. American General Annuity Service Corp.*, 54 P.3d 1139, 1145 (Utah 2002). As will be shown below, the trial court's legal conclusion that the Note is unambiguous was erroneous, and there are genuine issues of fact in dispute as to the intended meaning of the Note.

A. The Doctrine of Practical Construction

Utah adheres to the doctrine of practical construction, explained as follows:

> Where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation, the parties by their actions have created the ambiguity to bring the rule into operation. If this were not the case, the courts would be enforcing one contract when both parties

> have demonstrated that they meant and intended to [sic] the contract to be quite different.

Bullfrog Marina, supra, 501 P.2d at 271 (emphasis added); *accord, Zeese v. Estate of Siegel,* 534 P.2d 85, 90 (Utah 1975), and cases cited therein.

The doctrine of practical construction is consistent with Utah case law holding that parol evidence must be considered in determining whether or not a writing is ambiguous. *Ward v. Intermountain Farmers Association,* 907 P.2d 264, 268 (Utah 1995); *accord, Nielsen v. Gold's Gym,* 78 P.3d 600, 601 (Utah 2003).

In the present case, the actions and performance of the parties established at least two areas of ambiguity: first, the due dates on the notes were unimportant; and second, although the notes were unconditional in form, in practice they were conditional.

With regard to due dates on the notes: None of the prior notes' due dates was enforced or even discussed. When the parties met to sign new notes, the focus of the discussions between them was not on repayment, but rather on reassurances that an Investment was imminent. (R. 61, 65-66) This was explained by Carl Champagne in his deposition:

Q. It didn't trouble you that it says at a precise due date?

A. No.

Q. Why didn't that trouble you?

A. Because of all the other foolishness that we were doing with all these other notes rolling them over. There was a pattern of when it becomes due, just roll them over, and I'm saying it doesn't bother me, you get the investment, Troy, we'll pay this.

Q. So you recognized that there was a due date on the note; you just anticipated it would be rolled over again?

A. Uh-huh. If he didn't get the investment, it's going to be rolled, just understanding here we're not paying any of this.

Deposition of Carl Champagne, at 67-68; R. 225-226 (emphasis added).

With regard to the conditional nature of the notes: In this series of documents there were two other promissory notes that (like the Note) appeared to be unconditional payment obligations but were not. The first such note was signed on or about March 1, 2001, in the amount of $220,000.00. (R. 70-72) Although in the form of a promissory note, the $220,000 note was really a line of credit. (R. 62) On the day it was signed, not more than $144,261.50 had been advanced to DSI. (R. 62)

The second such note was signed on or about May 16, 2001, in the amount of $175,000. Although the language of the $175,000 note indicated a present obligation in that amount, the actual intent of the parties was to promise a potential commission. The commission would be owing only if and when a Letter of Credit were issued to DSI in the amount of $1,500,000. (R. 63). The Letter of Credit was never issued. (R. 63). No claim has been made that the $175,000 note is an enforceable obligation of DSI, and no effort has been made to collect it. (R. 63)

When the Note was prepared to reflect the balance owing on all prior loans, neither the $220,000 note nor the $175,000 note were included in the payoff calculation. (R. 98-99). The absence of these notes from the payoff calculation is evidence that they were not intended as enforceable obligations.

The $220,000 note, the $175,000 note and the Note were all part of the ongoing business relationship between Mr. Thuett and DSI. Although nominally promissory notes, none of the three was intended to function as a note. Rather, they were *potential* obligations, subject to conditions that, though unstated in the body of each note, were understood and agreed upon by the parties.

Evidence of the course of dealings between the parties is admissible to show whether a written agreement is integrated. *Eie v. St. Benedict's Hospital,* 638 P.2d 1190, 1195 (Utah 1981).

In the present case, interpreting the Note without reference to the course of dealing would work an injustice on DSI. Mr. Thuett made the loans to DSI, not as a lender whose business is making loans and collecting them with interest, but rather as a broker interested in keeping a client going in order to realize a much larger return. That return would consist first of a substantial commission (and repayment of the loans) upon the closing of an Investment, and second of an equity position in DSI. Because he believed an Investment was imminent, and because he wanted the larger return, Mr. Thuett readily agreed that the loans would be repayable only from the proceeds of the Investment.

B. The Character of the Note is Ambiguous

In the court below, Cantamar asserted that the language of the Note is clear and unambiguous regarding its maturity date. (*See* Plaintiff's Memorandum of Points and Authorities in Support of its Renewed Summary Judgment, at 2; R. 201). Cantamar then argued that because the "four corners of the agreement" appear to be complete and unambiguous, parol evidence is not permitted. (*Id.*, at 3; R. 202)

Cantamar's argument ignores the requirement, set forth by the Utah Supreme Court in the *Ward* case, that parol evidence must be considered in deciding whether a writing is ambiguous. *Ward, supra,* 907 P.2d at 268 ("[when determining whether a contract is ambiguous, <u>any relevant evidence must be considered</u>").

Cantamar's argument also ignores the seminal case of *Colonial Leasing Company of New England, Inc. v. Larsen Brothers Construction Co.,* 731 P.2d 483 (Utah 1986). In *Colonial Leasing*, plaintiff financed defendant's acquisition of heavy equipment through a written agreement labeled as a "lease". 731 P.2d at 484. The "lease" contained an integration clause and expressly required return of the equipment at the end of the lease. *Id.* at 485.

Despite the lack of ambiguity in the language of the "lease" itself, the Utah Supreme Court held that a genuine issue of material fact as to the meaning and purpose of the document prevented summary judgment. *Id.* at 487. It was the "character" of the agreement, not its specific wording, that was ambiguous:

> It is the general rule that if an agreement is ambiguous because of lack of clarity in the meaning of particular terms, it is subject to parol evidence as to what the parties intended with respect to those terms. [Cites omitted] <u>We hold that rule also applies where the character of the written agreement itself is ambiguous even though its specific terms are not ambiguous</u>.

Colonial Leasing, supra, 731 P.2d at 487 (emphasis added).

In the present case, even though the maturity date in the Note is not ambiguous, the Note as a whole is ambiguous because its true character is not fully expressed in the language of the Note. In determining the true character of a written agreement, evidence of the surrounding circumstances and the intent of the parties should be considered, as well as the language of the writing itself. *Id.* at 487-488.

The same rule should be followed in the present case, which should be remanded for trial. The court below should be instructed to consider evidence of the parties' course of dealing, the language and nature of other notes entered into between the parties, and the verbal agreements placing conditions on the payment obligation in the Note. After considering all the evidence, the court below will be able to determine the true character and meaning of the Note.

III.

GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT ON THE ISSUE OF FRAUD

DSI pled fraud in the inducement as an affirmative defense. (*See* Answer, at 2, R. 20). Evidence in support of the defense was also presented. (*See* Champagne Aff., ¶¶22-29; R. 65-67). When Cantamar filed its motion for summary judgment, DSI argued fraud as an affirmative defense in its memorandum. (*See* Memorandum in Opposition to Summary Judgment, at 14-15, R. 113-114). At oral argument on the summary judgment motion, DSI's counsel raised fraud as a defense. (Tr. of Hearing May 6, 2004, at 14-16).

When fraud in the inducement is alleged as a defense to a written contract, parol evidence is admissible to prove the defense. *Union Bank v. Swenson,* 707 P.2d 663, 666 (Utah 1985).

The court below initially received DSI's evidence of fraud, but later excluded it. (*See* Findings and Conclusions, at 5, ¶4). The basis for excluding the evidence was the trial court's conclusion that the Note was an integrated agreement. *Id.* Having excluded DSI's evidence, the court below concluded that there was "no genuine issue as to any material fact," and based on that determination, enter summary judgment. *Id.*, at 6.

It was error for the court below to exclude DSI's evidence, since "[parol evidence is admissible to prove that a party was induced into a contract by fraud, <u>despite a determination that a writing is an integrated contract</u>." *Union Bank, supra,* 707 P.2d at 666 (emphasis added).

If DSI's evidence had not been erroneously excluded, summary judgment could not have been granted, since issues relating to fraud are issues of fact. *Berkeley Bank for Cooperatives v. Meibos,* 607 P.2d 798, 801 (Utah 1980).

There is an exception to the general rule just stated. In rare circumstances, the issue of "reasonable reliance", which is an essential element in a fraud claim, may be decided on summary judgment as a matter of law. *Gold Standard, Inc. v. Getty Oil Company,* 915 P.2d 1060, 1067

(Utah 1996).

In *Gold Standard*, plaintiff's fraud claim was based on a meeting which took place on March 2, 1982. *Id.* at 1067. At that meeting, defendant promised plaintiff that its 25% interest would be given back as soon as plaintiff got financing. *Id.* Plaintiff claimed fraud when defendant later reneged on that promise. *Id.* At trial, the jury found in favor of plaintiff and awarded substantial damages, including punitives. *Id.* at 1063.

Unfortunately for the plaintiff in *Gold Standard,* the trial court granted judgment n.o.v., dismissing the fraud claim. *Id.* at 1066. On appeal, the judgment n.o.v. was affirmed. *Id.* at 1069. Affirmance was based on the conclusion that plaintiff could not have reasonably relied on the promise made at the March 2 meeting:

> While the question of reasonable reliance is usually a matter within the province of the jury, [cite omitted] there are instances where courts may conclude that as a matter of law, there was no reasonable reliance.

Gold Standard, supra, 915 P.2d at 1067.

The specific facts in *Gold Standard* brought it within the exception, allowing the court to conclude as a matter of law that there was no reasonable reliance. In *Gold Standard,* the promise to restore plaintiff's 25% interest was made on March 2. The very next day, March 3, defendant sent a letter, which plaintiff received, which directly, explicitly, and specifically denied the promise. *Id.* at 1067. A second letter was sent on March 12, also denying the promise. *Id.* A third letter was hand delivered to plaintiff on March 24, to the same effect. *Id.*

In view of these letters, the Utah Supreme Court held that plaintiff could not possibly have continued to rely on the promise for more than one day, and nothing happened in that one day to cause damage to plaintiff. *Id.* at 1068.

The facts in the present case are not at all similar to those in *Gold Standard.* In contrast to the immediate and repeated disavowal of the promise in *Gold Standard,* the facts in the present case show the opposite pattern: repeated reaffirmations of the promise, and never a disavowal. (Champagne Aff., ¶¶22-29; R. 65-67).

In the court below, Cantamar argued that the *Gold Standard* rule should be applied in the present case, asserting that the Note itself was a writing disavowing the oral agreement. (*See* Reply Memorandum in Support of Motion for Summary Judgment, at 6-9, R. 131-134).

This argument is misplaced, however, because the Note does not contain any direct, explicit, or specific denial of the oral agreement. (*See* Note in Addendum below). The Note, instead, is silent with regard to the oral agreement, and therein lies the difference between a factual issue of reasonable reliance and a conclusion as a matter of law, a *la Gold Standard*.

The facts in the present case are much more closely aligned to those in the *Union Bank* case. In *Union Bank, supra*, the Swensons borrowed money from Union Bank for their company, State Lumber, Inc. 707 P.2d at 664. The loan documents contained signature lines for State Lumber and for the Swensons "individually and personally." *Id.* They signed the loan documents, the loan was made, the company defaulted, and the bank sued the Swensons personally. *Id.*

As a defense, Swensons claimed that the bank's officers had promised them "that their signatures were for <u>appearances only</u> and <u>no collection action would be brought against them personally</u>." *Id.* (Emphasis added).

The Bank sought to brush aside Swensons' defense, arguing that since the loan documents were integrated, evidence of the alleged verbal promises was barred by the parol evidence rule. *Id.* The trial court agreed and granted summary judgment, which the Supreme Court reversed. *Id.* at 664-665, 669.

The reasoning for the Court's reversal in *Union Bank* is applicable in the present case. The Court held that the Swensons' allegations raised a genuine issue of fraud in the inducement, precluding summary judgment. "Parol evidence is admissible to prove that a party was induced into a contract by fraud, <u>despite a determination that a writing is an integrated contract</u>." *Id.* (Emphasis added). The Court quoted the following rule with approval:

> If a parol contemporaneous agreement be the inducing cause of the written contract, or forms a part of the consideration therefor, <u>and it appears the writing was executed on the faith of the parol agreement or representation, extrinsic evidence is admissible</u>. *In such cases, the real basis for its admission is to show fraud.*

Union Bank, supra, 707 P.2d at 667, quoting from *Bell v. Lammon,* 179 P.2d 757, 761 (N.M. 1947) (italicized emphasis in the original; underlined emphasis added).

The same rule was followed by the Utah Supreme Court in a second case factually similar to the present case. In *W.W. and W.B. Gardner, Inc. v. Mann*, 680 P.2d 23 (Utah 1984), plaintiff was attempting to enforce a promissory note. 680 P.2d at 24. The trial court granted summary judgment in favor of the plaintiff in spite of the defendant's argument that when he signed the note, the plaintiff agreed to obtain payment of the note from a particular source. *Id.* On appeal, the plaintiff argued that the parol evidence rule barred evidence of the payment arrangement. *Id.* The Utah Supreme Court disagreed, holding that fraud is an exception to the parol evidence rule. The Court further held that evidence showing that a note was taken subject to an agreement for it to be repaid from a particular fund stated a claim for fraud sufficient to defeat summary judgment. *Id.* at 24-25.

The difference between *Gold Standard* on the one hand and *Union Bank* and *Gardner* on the other is that in *Gold Standard* the writings directly, explicitly and specifically denied the verbal promise, whereas in *Union Bank* and *Gardner* the notes were silent regarding the verbal promise.

The rule applied in *Union Bank* and *Gardner* should also be applied in the present case. The evidence establishes, for summary judgment purposes, that DSI signed the Note in reliance on an oral agreement that they would only have to repay the Note from the proceeds of an Investment. The Note itself was silent with regard to the agreement. For that reason, "reasonable reliance" is an issue of fact and summary judgment was improper.

IV.

THE COURT BELOW ERRED IN CONCLUDING THAT FAILURE OF THE CONDITION PRECEDENT MADE THE NOTE DUE AND PAYABLE

In the court below, there were two hearings on Cantamar's summary judgment motion. The first hearing took place on May 6, 2004. (Tr., at 1). At the conclusion of that hearing, Cantamar's motion for summary judgment was denied, without prejudice, largely because of parol evidence of a condition precedent. *Id.*, at 23:12 through 24:7.

The initial ruling of the court below, denying summary judgment, was correct because there is substantial parol evidence of a condition precedent. Even where a written agreement is integrated, the parol evidence rule does not bar evidence of a condition precedent. In *FMA Financial*

Corporation v. Hansen Dairy, Inc., 617 P.2d 327 (Utah 1980), defendants were farmers who wanted a corn silo. *Id.* at 328. They offered to buy the silo from a man named Levie. *Id.* Rather than financing the deal himself, Levie contacted FMA. *Id.* FMA arranged to buy the silo from Levie and lease it to the defendants. *Id.*

When the defendants met with Levie to sign FMA's lease, they made the deal conditional on Levie installing the silo "by corn harvest time." *Id.* at 329. Levie failed to set the silo up in time and defendants refused to pay for it. *Id.*

FMA sued the defendants for breach of the lease. *Id.* at 328. FMA argued that the lease was "integrated, clear, definite, and unambiguous", and did not require installation by "corn harvest time". *Id.* at 329. Because the written agreement contained no time limit for installation, FMA argued that testimony of such a limit was barred by the parol evidence rule. *Id.*

The *FMA* court observed that the parol evidence rule does not bar:

> ...proof that a party did not perform an obligation which it was <u>understood and agreed</u> by the parties

> was a condition precedent to the contract becoming effective.

Id. (emphasis added).

The same rule was applied in another Utah case:

> [I]f a written instrument is delivered upon an express condition, and is not to be effective until the condition is fulfilled, the condition upon which it was delivered, ... may be shown by parol.

Central Bank of Bingham v. Stephens, 199 P. 1018, 1021 (Utah 1921) (emphasis added).

The rule applied in *FMA* and *Central Bank* should also be applied in the present case. The testimony establishes, for summary judgment purposes, that the parties understood and agreed that only if and when Thuett obtained an Investment would the loans be repayable. That condition, like the one in *FMA*, was not written into the agreement. Instead, it functioned as a condition precedent to the payment obligation in the Note.

In 2005, Cantamar renewed its motion for summary judgment. A hearing on the renewed motion took place on July 7, 2005. (Tr. at 32). At the conclusion of the second hearing, the motion for summary judgment was granted. *Id.*, at 67, lines 4-10.

In granting summary judgment at the second hearing, the court below did not find or conclude against the existence of a condition precedent; instead, the court concluded that the condition precedent had failed, and therefore the Note was due and payable in full. (Findings and Conclusions, at 5, ¶5).

The conclusion of the court below was erroneous. The law in Utah is clear that failure of a condition precedent does not result in the obligation becoming immediately due. On the contrary, it acts to relieve the obligor of any duty to perform:

> Under well-established principles of contract interpretation, where the duty of the obligor to perform is contingent upon the occurrence or existence of a condition precedent, the obligee may not require performance by the obligor, because the obligor's duty, and conversely the obligee's right to demand performance, does not arise until that condition occurs or exists. [cite omitted] <u>Failure of a material condition precedent relieves the obligor of any duty to perform</u>.

Harper v. Great Salt Lake Council, Inc., 976 P.2d 1213, 1217 (Utah 1999) (emphasis added).

Most other courts follow the same rule. *See, e.g.*, *Dengler v. Hazel Blessinger Family Trust,* 106 P.3d 449, 454 (Idaho 2005) ("When there is a failure of a condition precedent through no fault of the parties, no liability or duty to perform arises under the contract"); *Johnson v. Coss,* 667 N.W.2d 701, 705 (S.D. 2003) ("It is a general principle of contract law that failure of a condition precedent ... bars enforcement of the contract"); *Management, Inc. v. Mastersons, Inc.,* 616 P.2d 356, 360 (Mont. 1980) ("If the condition is not fulfilled, the right to enforce the contract does not come into existence"); *Golden Heights Land Company, Inc. v. Norman Babel Mortgage Company,* 102 So.2d 858, 859 (Fla. App. 1958) ("the principle is well established that where a particular fund from which payments are to be made does not materialize, the court is not at liberty to grant a money judgment"); *Scafidi v. Johnson,* 420 So.2d 1113, 1116 (La. 1982) ("There was a condition precedent to Johnson's obligation: that is, receipt of dividends, or other distribution of corporate funds sufficient to make payment. Since there was nonperformance of this condition, Johnson is not liable on the note to Scafidi").

The present case should be remanded for trial. At trial, the court below can make findings based on all the evidence as to whether a condition precedent was in effect and if so, whether it has failed. If it has failed, and the Note (with its onerous interest rate and due date) is not enforceable under contract law, repayment of the loans may still be appropriate under equitable principles, on terms fair to both sides.

V.

GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT ON THE ISSUE WHETHER THE INTEREST ON THE NOTE WAS AN UNENFORCEABLE PENALTY

Utah's courts refuse to enforce liquidated damages provisions that amount to penalties. *Woodhaven Apartments v. Washington,* 942 P.2d 918, 920 (Utah 1997).

Any liquidated damages provision that exceeds a reasonable estimation of actual damages is an unenforceable penalty:

> Damages recoverable under a liquidated damages provision in a contract will generally be limited to an amount that represents a reasonable estimation, at the time the contract was drafted, of what would be necessary to compensate the nonbreaching party for losses caused by the breach. This policy is based on the view that any liquidated damages provision not so limited results in the imposition of a penalty on the breaching party that is not permitted.

Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896 (Utah 1989) (emphasis added).

Default interest rates in promissory notes are treated the same as liquidated damages provisions:

> Labeling a contract term an interest provision does not make it so. If, though labeled interest, it exacts a penalty or sets liquidated damages in an impermissible manner, it will not be enforced.

In re Kalian, 178 B.R. 308, 313-314 (Bkr. D.R.I. 1995) (emphasis added).

DSI has found only one Utah case deciding whether a default interest provision was unenforceable as a penalty. In *Prudential Capital Group Co. v. Mattson,* 802 P.2d 104 (Utah App. 1990), Mattson leased an airplane. The lease called for interest at 24% on all unpaid lease payments. *Id.* at 105. The Court of Appeals upheld the default interest provision for the following reasons:

1. The Court of Appeals was unable to compare actual damages against liquidated damages because the trial court made no findings and Mattson failed to marshal the evidence presented below, *id.* at 107;

2. Mattson had both legal and financial advice, was advised by his attorney not to sign the lease, but did it

anyway, *id.;* and

3. The liquidated damages ($246,461.69) were not so excessive, in view of the full term value of the lease ($1,279,588.80), as to shock the conscience of the reviewing court sufficiently to reverse the lower court. *Id.*

The present case is distinguishable from *Prudential* on all three points. First, Cantamar presented no evidence of damages other than loss of use of the money, and attorney's fees, both of which are separately provided for in the Note. DSI, however, did present evidence that there were no other damages. (Champagne Aff., ¶30; R. 67).

Second, DSI received no advice whatsoever regarding the advisability of signing the Note. (*Id.,* ¶26)

Finally, and most importantly, the default interest amount is disproportional to the loans. The loans (including the initial $10,000 loan), totaled $232,446. (Champagne Aff., ¶20, R. 64; Exhibit I, R. 98-99). Interest payments totaling $69,528.45 were made between March 1, 2001 and January 11, 2002, yet the principal amount of the Note was nevertheless increased to $269,285.07. *Id.* This means that interest totaling $106,367.52 (consisting of the $69,528.45 actually paid plus the increase of $36,839 in loan principle from $232,446 to $269,285) was charged on the loans, an effective annual interest rate of nearly 55% for the period of time from March 1, 2001, through January 11, 2002. Accrued interest was compounded with the principal amount of the loans to arrive at the amount of the Note.

The court below awarded Cantamar the 55% compounded interest rate built into the Note. Additional interest in the amount of $47,125 through December 11, 2002, was then added. Finally, the court required interest to be paid at the rate of 30% on the unpaid principle of the Note from and after December 11, 2002. (Findings and Conclusions, p.5,¶7).

Interest on $269,285 from December 11, 2002, through the date of entry of judgment (September 6, 2005) is $221,773. The Note amount ($269,285) plus interest through December 11, 2002 ($47,125) plus interest at the default rate of 30% through the date of entry of judgment ($221,773) equals $538,183. To this sum must be added the $69,528 in payments already made by DSI, making the total amount to be repaid by DSI to Cantamar $607,711. This exceeds the loan advances by $375,265, for an average annual interest rate of about 35% from March 2002 through September 2005.

In the *Mattson* case, one of the main reasons for finding no penalty was that actual damages exceeded interest charges by about 500%. 802 P.2d at 107. In the present case, the situation is the opposite: interest exceeds actual damages by 161%.

Summary judgment should be reversed and the case remanded for trial. At trial, the court below should determine whether the interest charged in the Note represents a reasonable estimation of actual damages. To the extent the interest exceeds actual foreseeable damages, it should be treated as an unenforceable penalty.

VI.

THIS CASE SHOULD BE REMANDED TO ALLOW THE COURT BELOW TO CONSIDER REFORMATION OF THE NOTE

Courts have power in equity to reform contracts to correct mutual mistake, and in appropriate cases to correct a unilateral mistake as well. *Guardian State Bank v. Stangl*, 778 P.2d 1, 4-6 (Utah 1989).

In the *Guardian State* case, the mistake was not a mutual mistake, but instead was a unilateral mistake. In that case, the bank endorsed and delivered a promissory note without a restrictive endorsement. 778 P.2d at 2. Omitting the restrictive endorsement resulted in the bank losing the ability to collect on the note from a guarantor. *Id.*, at 2-3. The trial court ruled against the bank, holding that the bank's unilateral mistake in failing to add the restrictive endorsement did not provide a basis for relief. *Id.*, at 3. The Utah Supreme Court reversed, reformed the endorsement, and added the restriction. In doing so, the Court provided guidance appropriate for the present case:

> When one party's mistake of fact is coupled with knowledge of the mistake by the other party or a mistake is produced by fraud or other inequitable conduct by the nonerring party, the mistake provides a basis for reformation or rescission.

Stangl, supra, 778 P.2d at 5 (emphasis added).

The mistake by DSI in the present case is the same as the mistake by the bank in the *Guardian State* case: failing to include language in a note. This mistake resulted in an unfair outcome inconsistent with the parties' understanding. Thuett knew very well that the Note did not contain the agreement making payment conditional on an Investment. Yet, he did nothing to correct DSI's mistake. Now Cantamar wants to take advantage of the omission despite the knowledge and active participation of its own agent (Thuett) in the failure. It would be inequitable to allow Cantamar to sweep its agent's promises under the rug and enforce the Note and its onerous interest rates. This case should be remanded so that the court below can consider all the evidence at trial in order to determine whether, in equity, DSI's mistake should be the basis for reforming the Note to conform to the actual intent of the parties.

VII.

THE PAROL EVIDENCE RULE CANNOT BE USED TO PREVENT EQUITABLE REFORMATION

The parol evidence rule does not apply in situations where reformation is appropriate:

> The right to reform is given, at least in part, so as to make the written instrument express the bargain the parties previously orally agreed upon. <u>When a writing is reformed the result is that an oral agreement is by court decree made legally effective although at variance with the writings which the parties had agreed upon as a memorial of their bargain. The principle itself modifies the parol evidence rule.</u>

Sine v. Harper, 222 P.2d 571, 578 (Utah 1950) (emphasis added); *accord, Kesler v. Rogers,* 542 P.2d 354, 358 (Utah 1975).

VIII.

CANTAMAR IS NOT ENTITLED TO ATTORNEYS FEES

The court below awarded attorney's fees in the amount of $30,243.00, and costs of $1,373.87, to Cantamar. (Findings and Conclusions at 5, ¶7).

The award of fees and costs to Cantamar was erroneous. It disregarded a fundamental rule of contract law: when one party to a valid contract commits an "uncured material failure" in its performance of the contract, the non-failing party is relieved of its duty to continue to perform under the contract." *Aquagen International, Inc. v. Calrae Trust,* 972 P.2d 411, 414 (Utah 1998).

In the present case, Cantamar has failed to perform an essential element of the Note, that is, to obtain an Investment for DSI. This failure was central to the performance of DSI pursuant to the terms of the Note, since it was understood and agreed that DSI would not have the capacity to pay pursuant to the terms of the Note without the Investment. (R. 65).

Since Cantamar has failed to secure an Investment, it cannot enforce the terms of the Note, specifically its due date, default interest rate, and amount.

CONCLUSION

DSI's parol evidence should not have been excluded. It was relevant and important in determining the meaning and character of the Note. Summary judgment must be reversed and the case remanded for trial.

DATED this 13th day of December, 2005.

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CERTIFICATE OF SERVICE

I, Chris L. Schmutz, hereby certify that on the 14th day of December, 2005, I caused the foregoing Brief of Appellants to be served on counsel for the Appellee by first class mail to the following address:

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1

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STATE OF UTAH

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THE CANTAMAR LLC, Plaintiff, v. CARLTON J. CHAMPAGNE, an individual, LON E. WILLIAMS, an individual, and DATA SYSTEMS INTERNATIONAL, INC., a Utah corporation, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT Case No. 030600077 Judge Darwin C. Hansen

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On July 7, 2005, hearing was held on Plaintiff's Renewed Motion for Summary Judgment.

Findings of Fact and Conclusions of law and Order Gr

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Having reviewed the pleadings and affidavits filed by the parties, having heard the arguments of counsel for Plaintiff and Defendants, and pursuant to the Court's ruling made July 7, 2003, the Court hereby enters the following findings of fact and conclusions of law and order.

FINDINGS OF FACT

1. Defendant Data Systems International, Inc. ("DSI") made, executed and delivered to Cantamar, for valuable consideration, a Promissory Note ("Note"), dated January 11, 2002, a copy of which is attached as Exhibit "A" to Cantamar's Complaint, in which defendant DSI promised to pay to Cantamar the sum of $269,285.07 plus interest thereon at the rate of 8% per annum, prior to maturity, and at the rate of 30% per annum after maturity.

2. The Note states that it is due and payable in full on May 11, 2002, as follows:

> The unpaid principal and accrued interest shall be payable in monthly installments of $1,795.23, beginning on February 11, 2002 and continuing until May 11, 2002 (the "Due Date") at which time the remaining unpaid principal and interest shall be due in full.

3. On or about January 17, 2002, defendants Carlton J. Champagne and Lon E. Williams each made, executed and delivered to Cantamar their Guaranty (the "Guaranties"), included on page 3 of the Note, wherein defendants Carlton J. Champagne and Lon E. Williams guaranteed and promised to pay to Cantamar all indebtedness owed by DSI to Cantamar.

4. DSI failed to pay the Note at maturity.

5. DSI has also failed to make monthly interest payments on the Note. DSI has not paid any interest on the Note since May, 2002.

6. The amount owing on the Note is the principal sum of $269,285.07 with accrued unpaid interest to and including December 11, 2002, of $47,124.89, all interest accruing thereafter on the unpaid principal at the default rate of interest of 30% per annum until all such principal is paid in full.

7. The Note was a refinance of prior obligations owed by DSI to Commercial Lending Group. Specifically, the Note refinanced outstanding obligations owed by DSI to Commercial Lending Group under a Promissory Note dated March 1, 2001 and a Promissory Note dated July 30, 2001.

8. Actual cash advanced to DSI pursuant to these prior notes that were refinanced by the Note to Cantamar was $222,446.00. The remaining amounts included in the Note were unpaid fees and interest under the prior notes owed to Commercial Lending Group.

9. Defendants allege that they entered into an oral agreement with Troy Thuett at the time the Note was signed that the Note would not be repaid until Troy Thuett obtained for DSI a $15 million investment.

10. Defendants acknowledge that the Note clearly states the terms of repayment, but for the alleged oral agreement concerning the Due Date.

11. The Note reflects monies borrowed by DSI, debt owed by DSI to Cantamar and is reflected on the books and records of DSI as an obligation owing to Cantamar.

12. Defendants also acknowledge that the Note evidences an obligation to make monthly interest payments.

13. Defendants made four monthly payments of interest under the Note, for the months of February, March, April and May, 2002 and made no other interest payments due to a lack of funds.

14. Defendants' last contact with Troy Thuett in relation to pursuing the $15 million investment for DSI was in early 2002.

15. Defendants do not have any current expectation that Thuett will obtain this investment for DSI and defendants consider it a "dead deal."

16. The interest rates stated in the Note were a substantial reduction of the interest rates on the notes owed by DSI to Commercial Lending Group that were refinanced by this Note, in that the prior notes bore interest at 72% per annum and 60% per annum (with the latter note providing for 120% per annum interest after default).

CONCLUSIONS OF LAW

1. DSI is obligated as Maker of the Note.

2. Defendants Carlton J. Champagne and Lon E. Williams are liable as guarantors of the Note.

3. The Note is unambiguous. The Note clearly and unambiguously states that monthly interest payments are required of the maker. The Note clearly and unambiguously states that the entire unpaid balance of the Note is due and payable in full on May 11, 2002, the "Due Date."

4. The Note is an integrated agreement, as a matter of law. The language of the Note suggests that the Note is integrated in that it contains the elements expected to be contained in a Note, including stating the repayment terms. Nothing in the language of the Note suggests that anything is missing from the Note. The unambiguous statement in the Note of the amount and the due date further suggests that the Note is an integrated agreement. Defendants' alleged oral agreement is insufficient to overcome the presumption of integration. Defendants' alleged oral agreement is therefore barred by the parol evidence rule.

5. Defendants' alleged condition precedent to the effectiveness of the Due Date has failed, making the Note due and payable in full.

6. Defendant DSI is in default under the terms of the Note for failure to make interest payments and for failure to pay the balance of the Note on the Due Date of May 11, 2002.

7. Defendants are jointly and severally indebted to plaintiff in the principal amount of $269,285.07, plus interest thereon to and including December 11, 2002 in the amount of $47,124.89, plus further interest thereafter on the unpaid principal at the contract rate of 30% per annum, until paid; plus plaintiff's attorneys' fees incurred herein in the amount of $30,243.00, plus plaintiffs' costs of suit of ~~$2,754.95~~ 1,375.87 RCH

8. The attorneys' fees awarded to plaintiff herein are provided for by the Note and are reasonable and appropriate.

IT IS HEREBY ORDERED as follows:

1. Plaintiff's renewed motion for summary judgment is granted, there being no genuine issue as to any material fact, and plaintiff is granted summary judgment against defendants on plaintiff's First and Second Causes of Action.

DATED this 6 day of Sept., 2005.

BY THE COURT:

Honorable Darwin C. Hansen
District Court Judge

STATE OF UTAH
SECOND JUDICIAL DISTRICT
County, Layton Department

APPROVED AS TO FORM:

Chris L. Schmutz

Attorney for Defendants

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of August, 2005, a true and correct copy of the foregoing proposed **FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT** was mailed, postage prepaid in the United States mail, addressed to the following:

Chris L. Schmutz
SCHMUTZ & MOLHMAN
533 West 2600 South #200
Bountiful, Utah 84010

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
Benjamin R. MAGELSEN, Plaintiff and Appellant,
v.
Randy FARNWORTH and Earl Loftus, dba Randy's Heating and Air Conditioning, Inc., Defendants and Appellees.
No. 20030320-CA.

April 21, 2005.

Fourth District, Provo Department; The Honorable Claudia Laycock.

Blake T. Ostler, Salt Lake City, for Appellant.

Stephen Quesenberry and J. Bryan Quesenberry, Provo, for Appellees.

Before Judges BENCH, JACKSON, and THORNE.

MEMORANDUM DECISION (Not For Official Publication)
THORNE, Judge:

***1** Benjamin R. Magelsen sued Randy Farnworth and Earl Loftus, dba Randy's Heating and Air Conditioning, Inc. (collectively Randy's), for breach of contract arising out of the installation of a heating and air conditioning (HVAC) system in Magelsen's home. Following a bench trial, the trial court entered judgment in favor of Randy's. Magelsen appeals and we affirm.

Magelsen first challenges the trial court's determination that a written contract between Magelsen and Randy's was not an integrated agreement. " 'An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement.' " ***Novell, Inc. v. Canopy Group, Inc.*, 2004 UT App 162,¶ 10, 92 P.3d 768** (quoting *Eie v. St. Benedict's Hosp.*, 638 P.2d 1190, 1194 (Utah 1981)). However, even though a writing appears to be integrated on its face, a court may still consider any relevant evidence, including parol evidence, to make its initial integration determination. *See id.* at ¶ 11.

Here, the trial court was presented with two conflicting versions of the same written contract. The court properly determined that, at a minimum, parol evidence was necessary to resolve the conflict between the two documents. [FN1] However, the court was also presented with several other oral and written agreements between the parties pertaining to the HVAC installation. These other agreements occurred both before and after the execution of the written contract, and included an initial proposal and two postcontract change orders. In light of the evidence, the trial court appropriately viewed the written contract as one piece of the parties' ongoing and evolving agreement rather than as the "final and complete expression" of their intent. *Id.* at ¶ 10.

FN1. The court ultimately determined that the written agreement provided by Magelsen was fraudulently created.

Following a bench trial, the trial court entered judgment awarding damages and attorney fees to Randy's. The trial court entered extensive factual findings in support of this judgment, particularly addressing the intent of the parties as regards their various agreements. Magelsen challenges several of the trial court's factual findings on the intent of the parties.

" 'If a contract is not integrated or is ambiguous and the trial court finds facts regarding the parties' intent based on extrinsic evidence, we will not disturb the findings unless they are clearly erroneous.' " *Fairbourn Commercial, Inc. v. American Hous. Partners, Inc.*, 2003 UT App 98,¶ 13, 68 P.3d 1038 (quoting *Schmidt v. Downs*, 775 P.2d 427, 430 (Utah Ct.App.1989)), *aff'd*, 2004 UT 54, 94 P.3d 292. To successfully challenge the trial court's factual findings, Magelsen "must marshal all relevant evidence presented at trial which tends to support the findings and demonstrate why the findings are clearly erroneous." *Rappleye v. Rappleye*, 2004 UT App 290,¶ 27, 99 P.3d 348 (quotations and citation omitted), *cert. denied*, 106 P.3d 743 (Utah 2004).

Magelsen has failed to marshal the evidence in support of the trial court's findings, and accordingly his challenge to those findings must fail. Further, the trial court made specific findings that Magelsen and his witnesses lacked credibility and that Magelsen submitted a fraudulent version of the parties' written contract to the court as evidence. Under these circumstances, we will presume that the trial court's factual findings are correct.

***2** Magelsen also challenges the trial court's award of damages and attorney fees to Randy's, and its failure to award damages to him. The damages and attorney fees awards are adequately supported and justified by the trial court's factual findings, and Magelsen has presented no legal authority to the contrary. Rather, Magelsen's arguments regarding the awards implicitly attack the trial court's factual findings. As such, these arguments also fail for lack of marshaling. *See id.*

The trial court properly determined that the written agreement of the parties was not integrated and made extensive factual findings that support its judgment of damages and attorney fees in favor of Randy's. Accordingly, the judgment of the trial court is affirmed.

WE CONCUR: RUSSELL W. BENCH, Associate Presiding Judge and NORMAN H. JACKSON, Judge.

2005 WL 914186 (Utah App.), 2005 UT App 188

END OF DOCUMENT

BALLOON PAYMENT PROMISSORY NOTE

$269,285.07 Date: January 11, 2002

For value received, the undersigned Data Systems International (the "Borrower"), at 240 W. 200 S. #105, P.O. Box 750, Farmington, Utah 84025, promises to pay to the order of The Cantamar LLC, (the "Lender"), at 1935 E. Deere Valley Dr., Layton, Utah 84040, (or at such other place as the Lender may designate in writing) the sum of $269,285.07 with interest from January 11, 2002, on the unpaid principal at the rate of 8.00% per annum.

Unpaid principal after the Due Date shown below shall accrue interest at a rate of 30.00% annually until paid.

The unpaid principal and accrued interest shall be payable in monthly installments of $1,795.23, beginning on February 11, 2002, and continuing until May 11, 2002, (the "Due Date"), at which time the remaining unpaid principal and interest shall be due in full.

THE BORROWER UNDERSTANDS THAT THE PAYMENT OF THE ABOVE INSTALLMENT PAYMENTS MAY NOT FULLY AMORTIZE THE PRINCIPAL BALANCE OF THE NOTE, AND THEREFORE, A BALLOON PAYMENT MAY BE DUE ON THE DUE DATE.

All payments on this Note shall be applied first in payment of accrued interest and any remainder in payment of principal.

The Borrower promises to pay a late charge of $250.00 for each installment that remains unpaid more than 10 day(s) after its Due Date. This late charge shall be paid as liquidated damages in lieu of actual damages, and not as a penalty.

If any installment is not paid when due, the remaining unpaid principal balance and accrued interest shall become due immediately at the option of the Lender.

The Borrower reserves the right to prepay this Note (in whole or in part) prior to the Due Date with no prepayment penalty.

If any payment obligation under this Note is not paid when due, the Borrower promises to pay all costs of collection, including reasonable attorney fees, whether or not a lawsuit is commenced as part of the collection process.

This Note is secured by a Accounts receivables in the form of future contracts from Ventura

County, of which a minimum of 50% of the profits will be paid toward retirement of this loan. This loan will be paid from proceeds received from that contract and or other receivables of the company. In the case of new operating captial investments this loan will be retired upon the funding of the new loan., dated January 11, 2002. The Lender is not required to rely on the above security instrument and the assets secured therein for the payment of this Note in the case of default, but may proceed directly against the Borrower.

If any of the following events of default occur, this Note and any other obligations of the Borrower to the Lender, shall become due immediately, without demand or notice:

1) the failure of the Borrower to pay the principal and any accrued interest in full on or before the Due Date;

2) the death of the Borrower or Lender;

3) the filing of bankruptcy proceedings involving the Borrower as a Debtor;

4) the application for the appointment of a receiver for the Borrower;

5) the making of a general assignment for the benefit of the Borrower's creditors;

6) the insolvency of the Borrower;

7) a misrepresentation by the Borrower to the Lender for the purpose of obtaining or extending credit.

In addition, the Borrower shall be in default if there is a sale, transfer, assignment, or any other disposition of any assets pledged as security for the payment of this Note, or if there is a default in any security agreement which secures this Note.

If any one or more of the provisions of this Note are determined to be unenforceable, in whole or in part, for any reason, the remaining provisions shall remain fully operative.

All payments of principal and interest on this Note shall be paid in the legal currency of the United States. The Borrower waives presentment for payment, protest, and notice of protest and nonpayment of this Note.

No renewal or extension of this Note, delay in enforcing any right of the Lender under this Note, or assignment by Lender of this Note shall affect the liability or the obligations of the Borrower. All rights of the Lender under this Note are cumulative and may be exercised concurrently or consecutively at the Lender's option.

This Note shall be construed in accordance with the laws of the State of Utah.

Borrower:
Data Systems International

By: Carl Champagne and Lon E. Williams

Carl Champagne and Lon Williams

GUARANTY

Carl Champainge and Lon Williams both together and individually unconditionally guarantees all the obligations of the Borrower under this Note.

Date: Jan 17, 2002.

Carl Champainge and Lon Williams both together and individually

By: Carl Champagne and Lon E. Williams

Carl Champainge and Lon Williams

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